Supreme Court, U.S.
FILED

10-628 NOV 12 2010

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Kevin J. O'Connor,
Petitioner,

v.

Colorado College,
Respondent

On Petition For Writ Of Certiorari To
The Colorado Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The customs and usage of tenure and Academic Freedom in the United States provide that a Faculty Hearing Committee convene to determine whether adequate cause exists for dismissal of a tenured professor.

The question presented is:

Whether the opinion of the Colorado Court of Appeals, that a unanimous Academic Freedom ruling of a Faculty Hearing Committee "carries no weight" and does not, therefore, protect a tenured professor from discretionary dismissal, is at variance with the holdings of this Court and other federal and state courts on Academic Freedom.

PARTIES TO THE PROCEEDING

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Richard Celeste, President of the College
Richard Storey, Dean of the College
Clara Lomas, Chair of the Department
Salvino Bizzarro, Professor
Marie Daniels, Professor

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kevin J. O'Connor respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

OPINION BELOW

The opinion of the Colorado Court of Appeals (Pet. App. A 1-19) affirming the trial court's judgment is unpublished.

JURISDICTION

The Colorado Court of Appeals decided this case on January 7, 2010. A copy of that opinion appears at Appendix A.

Judgment was entered against Plaintiff in El Paso County District Court, Colorado on November 14, 2007. A copy of the Judgment is attached at Appendix B.

A timely petition for rehearing was denied by the Colorado Court of Appeals on March 4, 2010 and a copy of the order denying rehearing appears at Appendix C.

A timely petition for a writ of certiorari was thereafter denied by the Colorado Supreme Court on August 16, 2010 and a copy of the order denying certiorari appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Kevin J. O'Connor was induced to leave his position at the University of Missouri-Kansas City in 1986 with an offer of the possibility of earning tenure at Colorado College. After the customary 7-year review, O'Connor was, in fact, granted tenure. A Fulbright and NEH scholar, O'Connor was named Teacher of the Year both by Colorado College and the state chapter of the American Association of Teachers of Spanish and Portuguese (AATSP).

The provisions of tenure at Colorado College, and the guarantee of lifetime employment which tenure provides, are consistent with those of other institutions of higher learning in the United States. This Court has spoken on the importance of Academic Freedom in preserving free inquiry in U.S. colleges and universities. *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957). There is no requirement that tenure be granted. *University of Baltimore v. Peri Iz*, 123 Md. App. 135; 716 A.2d 1107; 1998 Md. App. ("A faculty member who satisfies qualifications in every category is not necessarily assured the award of tenure.") Once granted, however, the customs and usage of tenure in American higher education provide that it may only be revoked with cause for serious dereliction of duty. Prior to dismissal, the *Faculty Handbook* of Colorado College requires that the determination of adequate cause must be made by a Faculty Hearing Committee (FHC).

Following an independent performance review that called O'Connor a "department workhorse,"

college officials brought charges of neglect of duty against the Teacher of the Year, seeking his dismissal. An evidentiary hearing was held before a three-member Faculty Hearing Committee, appointed in accordance with relevant provisions of the *Faculty Handbook*. The panel heard 20 hours of sworn testimony on April 7-8, 2004. Both parties were represented by counsel.

After deliberating for two months, the Hearing Committee submitted its Report to the President on June 7, 2004. The Hearing Committee rejected the overwhelming majority of the charges of neglect of duty and ruled unanimously that the administration had failed to establish adequate cause for O'Connor's dismissal.

The Committee went on to address the deeply troubled state of the Department of Romance Languages and recommended that "professional resources in conflict resolution be provided" to address the long-standing conflict between O'Connor and senior members of the department who had sought his removal.

The Committee further recommended that department chair Clara Lomas, who had coordinated the effort to terminate O'Connor, be removed.

The Committee finally recommended a two-year period of probation during which O'Connor, guided by a Mentor, would be expected to perform the "normal duties" of a member of the college faculty.

Pertinent provisions of the *Faculty Handbook* allow the President to reject the findings of the FHC. Should he choose to exercise this option, he must give written notice to the faculty member and the FHC of his reasons for doing so. It is undisputed that the President did not reject the findings of the FHC. On the contrary, the President admitted that he did, in fact, accept the Hearing Committee's findings. Record Vol. 3, 1101-1102.

Richard Storey, the dean who had brought charges against O'Connor, resigned his position shortly after the conclusion of the termination hearing. In his final report, Storey endorsed the Hearing Committee recommendations that O'Connor not be terminated and that Lomas be removed as chair.

Storey further recommended that, in the event the President chose not to remove Lomas, O'Connor be reassigned to another college division. O'Connor offered to accept reassignment.

The President decided not to remove Lomas and not to reassign O'Connor. Instead, on August 31, 2004, the President issued a "Directive" governing the conditions of O'Connor's future employment at the college. O'Connor was advised to sign the "Directive," or be fired immediately.

Documents produced in discovery and ordered returned to defendants revealed a fraudulent plan to fire O'Connor by means of such a Directive. Record Vol. 1, 190-91.

Under the terms of the "Directive," if the President determined at any time that O'Connor had failed to adhere to the "Directive," he could recommend dismissal immediately, without an evidentiary hearing, to the Board of Trustees.

O'Connor expressed concern about being forced to return to a hostile department chaired by the same person, Lomas, who had sought his dismissal. The President assured O'Connor that he would follow the Hearing Committee recommendation to provide resources in conflict resolution "as needed."

Instead of the Mentor recommended by the Hearing Committee, the President appointed a "Mentoring Committee" who advised O'Connor: "we do not consider it our responsibility to defend tenure." Exhibit 185. The President instructed the two acting deans who replaced Storey to meet with O'Connor each month to identify areas of concern and, where needed, to develop "detailed plans and timelines for compliance."

The President's "Directive" required O'Connor, *inter alia*, to co-direct the Mexico Program. O'Connor had directed the Mexico program 3 times over a ten-year period but refused to direct after the program was moved to Oaxaca because of the program's academic deficiencies.

O'Connor had been charged with neglect of duty for failing to recruit students for Oaxaca. The Hearing Committee rejected the charge and ruled that O'Connor's refusal to participate in the Oaxaca

program was a legitimate exercise of academic freedom.

As if to reassure O'Connor that the academic freedom ruling of the Hearing Committee on Oaxaca would be respected, both chair Lomas and acting dean Nelson-Cisneros met with O'Connor and advised him of their plans to move the program from Oaxaca.

On two separate occasions during the fall semester, O'Connor emailed Lomas reiterating his commitment to cooperate with her in moving the program from Oaxaca. Lomas did not respond.

While O'Connor was attempting to communicate with Lomas about Oaxaca, the acting deans, in violation of the "Directive," failed to meet with O'Connor.

In January, 2005, Lomas suddenly shifted gears and told O'Connor he must go to Oaxaca.

O'Connor wrote immediately to the President expressing concern that he was being ordered to go to Oaxaca, despite the Hearing Committee's academic freedom ruling. The President did not reply. Record Vol.1, 1528.

On February 25, 2005, Lomas wrote to O'Connor: 'I think it would be much more productive for you to carry out President Celeste's 'directive' . . . My understanding is that this issue is not up for debate at this point in time." Record Vol.1, 1530.

At the end of March, 2005, the acting deans who had not met with O'Connor during the fall, now met with him two days in a row to discuss Oaxaca. Acting dean Nelson-Cisneros noted:

> "[O'Connor] stated that the Hearing Committee had found that he was within his right not to direct the program based on his academic freedom. *I told him that the Hearing Committee report was the past* and he was under an agreement that he signed that indicated he would direct the Mexico program. He responded that the location of Oaxaca does not appear anywhere in the President's directive." Record Vol.3, 2488. (emphasis added)

On April 4, 2005, O'Connor sent a second letter to Celeste explaining his concern about being placed in double jeopardy: being ordered to Oaxaca under threat of dismissal after the Hearing Committee had ruled that this was a matter of academic freedom and did not constitute grounds for dismissal. Record Vol.1, 1534.

The President, who had not responded to O'Connor's attempts to communicate with him on the Oaxaca issue since January, now advised O'Connor that he considered the continued refusal to take students to Oaxaca a "material breach" of the President's own "Directive" and that he was considering terminating O'Connor's tenured employment.

At no time did the President ever mention the Hearing Committee ruling on academic freedom or

advise O'Connor that he could not rely on that ruling.

O'Connor reaffirmed throughout his commitment to participate in a quality program in Mexico at a site other than Oaxaca and his belief that the Oaxaca matter had already been settled by the Hearing Committee.

Even though neither Lomas nor Nelson-Cisneros had followed through on their plans to move the program from Oaxaca, O'Connor insisted there was still time for him to do so. O'Connor reaffirmed his commitment to direct a quality Mexico Program in the second probationary year.

However, without further discussion, the President removed O'Connor as Mexico Program Director and replaced him with Lomas.

O'Connor's performance throughout the year had been monitored by the Mentoring Committee and, intermittently, by the two acting deans. O'Connor himself had submitted regular reports of his professional activities to the Mentoring Committee, the acting deans and the President.

Based on his performance, the Mentoring Committee had recommended a salary increase for O'Connor in the following academic year, the second and final probationary year. The Humanities Executive Committee, the next level of review, had endorsed the raise for O'Connor and forwarded it to the dean's office in the spring.

On May 16, 2005, the President wrote to advise O'Connor that he was recommending dismissal to the Board of Trustees: "I have concluded that your *deliberate breach of my return to work directive* is substantial." The President notified O'Connor that the sole basis for dismissal was O'Connor's refusal to direct the program abroad. Record Vol.1, 719.

On May 20, 2005, O'Connor met for one hour with the Executive Committee of the Board of Trustees. O'Connor was not given copies of the evidence the President had provided to the Trustees. O'Connor's counsel was present but was not permitted to speak.

After 19 years of service, O'Connor's tenured employment was terminated on May 23, 2005.

Shortly after O'Connor's dismissal, due to civil unrest in Oaxaca, the program was moved on short notice to another location in Mexico.

O'Connor commenced this action in District Court, El Paso County, Colorado, for breach of the tenure contract, discharge in violation of public policy and related claims against the College and its officials. The jury returned a verdict in favor of Defendants. O'Connor appealed arguing that the unanimous ruling of the FHC on Academic Freedom protected him from dismissal solely on that basis.

The Colorado Court of Appeals held that the College was not bound by the unanimous ruling of

the Faculty Hearing Committee and that the FHC finding on Academic Freedom "carries no weight."

This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Colorado Court of Appeals Departs from the Controlling Precedents of This Court on Academic Freedom

The purpose of tenure is to ensure that US colleges and universities will remain the true marketplace of ideas where all positions—even the most unpopular—may contend freely and without fear of reprisal. "Tenure is designed to eliminate the chilling effect that the threat of discretionary dismissal casts over academic pursuits." *Browzin v. Catholic Univ.*, 174 U.S. App. D.C. 60, 527 F.2d 843, 848 (D.C. Cir. 1975).

As James Madison warned: "A people who mean to be their own governors must arm themselves with the power that knowledge gives. A popular Government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance...."[1]

This Court has previously discerned the fundamental importance of Academic Freedom in a democratic society:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities

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[1] James Madison to W. T. Barry 4 Aug. 1822

would imperil the future of our Nation." *Sweezy, supra.*

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian* v. *Board of Regents of Univ. of State of N. Y.,* 385 U. S. 589, 603 (1967)

The customs and usage of tenure in American higher education are contained in the *1940 Statement of Principles on Academic Freedom and Tenure* of the American Association of University Professors.

The fundamental protection of Academic Freedom is the provision that the tenured faculty member shall be terminated: 1. only for adequate cause; and 2. that the determination of adequate cause shall be made, not by administrative fiat, but rather by a faculty committee.

II. The Decision Below Erroneously Construes the Protection Afforded by Academic Freedom from Discretionary Dismissal

Here, a Faculty Hearing Committee (FHC), appointed under the provisions of the *Faculty Handbook* of Colorado College, found unanimously that the administration of the College failed to establish adequate cause for dismissal.

Furthermore, the FHC ruled that O'Connor's refusal to direct a substandard program of study abroad was a matter of Academic Freedom.

Despite the ruling, the President of the College issued a Directive ordering O'Connor to direct the program in question and fired O'Connor when he refused to do so.

The Colorado Court of Appeals held that "the College was not bound by the FHC's earlier determination that [O'Connor']s refusal to participate in the . . . program was a valid exercise of academic freedom" (Pet. App. at 7). The court concluded that the FHC Academic Freedom ruling on which O'Connor relied "carries no weight." (Pet. App. at 7).

The Colorado ruling erroneously construes the Academic Freedom holdings of this Court in the cases cited. *Sweezy*, supra; *Keyishian*; supra as well as opinions of federal and state courts, including other divisions of the Colorado Court of Appeals.

The Colorado court goes where no court has previously gone. It strips the tenured faculty member of the protection of Academic Freedom and allows a hostile administrator to substitute his own unilateral determination for that of the Faculty Hearing Committee. When the faculty review board refused to ratify the decision the President had already made regarding O'Connor's dismissal[2], the President had two procedural options: 1. To accept the FHC findings or 2. to reject the findings of the FHC and explain in writing his reasons for doing so.

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[2] Prior to the FHC hearing, the President emailed the Dean that O'Connor was a "candidate for the broom." Record, Vol. 3, 3003-04

Instead, the President devised an extraprocedural measure to issue a Directive and fire O'Connor if he, the President, determined, without benefit of faculty review, that O'Connor had violated any of its terms. The Colorado court overlooks the basic tenet that "it is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau* 400 U.S. 433; 91 S. Ct. 507; 27 L. Ed. 2d 515.

Further, the court abrogates to the judiciary the authority, heretofore entrusted to the professional review committee universally recognized as the competent authority, to determine the central issue: whether adequate cause for dismissal exists.

In this regard, the Colorado ruling is at war with this Court's precedents.

> When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214; 106 S. Ct. 507; 88 L. Ed. 2d 523.

State courts have since followed the principle that the faculty's professional judgment should be respected.

> It is well settled that courts should not invade, and only rarely assume academic oversight, except with the greatest caution and restraint, in such sensitive areas as faculty appointment, promotion, and tenure, especially in institutions of higher learning. *Bigler v. Cornell University* 266 A.D.2d 92; 698 N.Y.S.2d 472; 1999 N.Y. App. Div.

In upholding the college administration's decision to disregard both the FHC Academic Freedom ruling and the unanimous determination that adequate cause for dismissal was not established, the Colorado court eviscerates the protection of tenure. First, in the surprising and anomalous opinion that the FHC "carries no weight," the professional role of the faculty is nullified by Presidential directive and subsequent judicial review.

While courts have recognized the authority of college administrations to determine the proper course of action in times of financial exigency, that crisis must be real and demonstrable. *AAUP v. Bloomfield College*, 136 N.J. Super. 442; 346 A.2d 615; 1975 N.J. Super. No such financial exigency was averred by the college in this case. The college offered no legal argument for the President's authority to usurp the role and function of the Faculty Hearing Committee in program and personnel matters. The Colorado court, in error, departs from opinions of other state courts in upholding the President's discretionary dismissal.

III. Academic Freedom and Employee-Speech Jurisprudence

This case provides the ideal vehicle for this Court to resolve the ramifications of employee-speech jurisprudence for academic freedom and to decide whether the analysis in *Garcetti v. Ceballos*, 547 U.S. 410; 126 S. Ct. 1951; 164 L. Ed. 2d 689; 2006. would apply in the same manner. The minority suggested that the canons of the profession help to diminish the risk that the courts will improperly interfere with the authority to manage the workplace.

O'Connor refused to shortchange his students with a substandard, albeit profitable, program of study abroad. The faculty hearing committee agreed that O'Connor's decision was protected by Academic Freedom. Here, however, the Colorado court held that administrative directive supersedes the authority of the faculty to make fundamental decisions regarding program quality, i.e., the program abroad. Analogous to the argument made by the Los Angeles District Attorney's office in *Garcetti, supra,* the college argued here that to allow this kind of freedom would disrupt college operations.[3]

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[3] Record, Vol. 3, 2878 The Colorado court did not address O'Connor's argument that no other tenured member of the department had directed the program following his refusal to do so, nor did any other faculty member face disciplinary action for refusing to do so. After O'Connor's dismissal, the program was moved to a different location.

As the minority noted, "[P]rofessionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards." citing, *106 Yale L.J. 151,172* (1996). While the administration may exercise final authority in academic decisions where financial exigency is present, faculty owe a loyalty and commitment to professional standards that supersedes their duty to the administrative hierarchy.

Of even greater concern than the ruling on professional responsibility for academic program quality is the Colorado court's ruling that the administration is not bound by the FHC decision on adequate cause. The authority to determine whether adequate cause exists for dismissal of tenured faculty rests squarely with the faculty. It is undisputed that here the FHC determined unanimously that the college had failed to establish adequate cause for dismissal and, specifically, that O'Connor's refusal to direct a substandard program was not grounds for dismissal. The administration did not challenge the findings. Instead, they designed an end around, issuing a Directive and then firing O'Connor for the program charge already rejected by the FHC. In affirming this strategy, the Colorado court's ruling is at variance with the holdings of this Court and other courts of appeals.

In fact, there is, an intractable division with previous opinions of the Colorado Court of Appeals regarding the protective function of the faculty hearing committee in post hearing proceedings.

Another division of the Colorado court previously held that the hearing committee findings are the "foundation on which all later administrative procedure and judicial review must depend." *Lara v. Córdova*, 42 Colo. App. 483; 600 P.2d 105; 1979 Colo. App. If the College is not bound by the findings of the Hearing Committee, then the "insulative protection" of tenure is lost. *Id. See also, Saxe v. Board of Trustees of Metropolitan State College of Denver,* 179 P.3d 67, (Colo. App. 2007) where the court rejected the unilateral and arbitrary rewriting of the tenure contract to permit the President improperly "to both initiate and resolve a dismissal."

As federal courts have held, without the protection of tenure, the threat of arbitrary dismissal like that upheld by the Colorado court in the instant decision, will cast a "chilling effect . . . over academic pursuits." *Browzin, supra.*

IV. Discharge in Violation of Public Policy

This case also provides the opportunity to address unresolved matters related to speech not protected by academic freedom but rather by "the powerful network of legislative enactments . . . available to those who seek to expose wrongdoing." *Garcetti, supra.* The minority expressed concern, in view of restrictions imposed by the decision on employee speech, regarding how the "patchwork" of statutes and interpretations protecting whistleblowers would afford protection to employees who spoke out on matters of public concern.

Here, O'Connor's dismissal followed closely upon his whistle blowing on a major asbestos release in a college classroom building. Two weeks after state public health officials contacted the college about his complaint, dismissal proceedings against O'Connor were begun.

The college argued that since O'Connor was protected from arbitrary dismissal by the tenure contract, he could not invoke the protection of whistleblowing statutes. Citing *Doll v. U.S. West Communications, Inc.*, 85 F. Supp. 2d 1038, 1046 (D. Colo. 2000), the college argued for dismissal based on the United States District Court for the District of Colorado conclusion that under Colorado law a claim for wrongful discharge in violation of public policy applies only to at-will employees, not to employees subject to employment agreements. As the court explained:

> The rationale for this rule is that the public policy exception protects at-will employees who can be fired for any reason. . . . "[T]he express reason for recognizing this tort and thus modifying the terminable at-will rule, was the need to encourage job security for those employees not protected from wrongful discharge by an employment contract." *Silva v. Albuquerque Assembly & Dist. Freeport Warehouse Corp.* 738 P.2d 513, 515 N.M. 1987.

Therefore, under the theory of the college administration, wrongful discharge in violation of public policy is not a recognized claim where there is an employment agreement that governs the

relationship between the parties, and this claim should be dismissed.

The college's two-pronged strategy proceeded to remove the tenure protection as well, arguing that O'Connor's refusal to direct the program was not protected by academic freedom, as the FHC had ruled. O'Connor, now shorn of both academic freedom and whistleblowing protection, learned that the FHC decision on adequate cause for dismissal "carries no weight."

In the absence of clear guidance from the Supreme Court, this strategy of removing first, whistleblower protection and then, academic freedom creates an insurmountable obstacle for those who would speak out on matters of public concern.

The instant holding of the Colorado Court of Appeals charts a new course, at variance with the Academic Freedom holdings of this Court, that will have a profoundly chilling effect on faculty at institutions of higher learning in the U.S. and the young minds who seek knowledge in a space where free inquiry is protected. Absent review by this Court, this pervasive split defeats and will continue to defeat, the uniform application of the holdings of this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Kevin J. O'Connor, *Pro Se*
Dated: November 12, 2010

APPENDIX

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Appendix A Decision of Colorado Court of Appeals

Appendix B Judgment of District Court, El Paso County, Colorado

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COLORADO COURT OF APPEALS

Court of Appeals No. 07CA2571
El Paso County District Court No. 06CV733
Honorable Larry E. Schwartz, Judge

Kevin J. O'Connor,

Plaintiff-Appellant:

v.

Colorado College, a Colorado nonprofit corporation; Richard F. Celeste, President of Colorado College; Richard Storey, former Dean of Colorado College; Clara Lomas, Chair of the Colorado College Department of Romance Languages; Salvino Bizzarro, Colorado College Professor; and Marie Daniels, Colorado College Professor.

Defendants-Appellees:

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE TERRY
RUSSEL and Ney*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced January 7, 2010
APPENDIX A

Kevin J. O'Connor, Pro Se

Brownstein, Hyatt, Farber, Schreck, LLP, David D. Powell, Jr.. Richard P. Barkley, Denver, Colorado for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2009

Plaintiff, Kevin J. O'Connor, appeals the judgment entered against him on his claims against defendants, Colorado College, President Richard F. Celeste, former Dean Richard Storey, Department Chair Clara Lomas, Professor Salvino Bizzarro, and Marie Daniels. We affirm.

I. Background

O'Connor was a tenured professor in the Department of Romance Languages at Colorado College. In March 2003, the College dean initiated dismissal proceedings against O'Connor for multiple derelictions of duty. The College entered into negotiations with O'Connor, which broke down in August 2003. When O'Connor missed the College's fall conference and did not meet with his new advisees, the dean suspended him with pay until the College reached a decision regarding termination.

In September 2003, O'Connor relied on a provision of the Faculty Handbook (Handbook) to request an informal inquiry by the Faculty Executive Committee (FEC). The FEC found examples of neglect of duty by O'Connor, and in October 2003,

the dean informed O'Connor that he was recommending his immediate termination based on neglect of duty. In February 2004, the College president notified O'Connor that he intended to recommend his termination to the Board of Trustees.

O'Connor responded by requesting as permitted under the Handbook, a formal hearing before the Faculty Hearing Committee (FHC). While the FHC did not find "adequate cause for dismissal," it concluded in its June 2004 report that O'Connor was deficient in several performance areas, and recommended that he be placed on probation for two years. It also recommended his dismissal if he "fail[ed] to meet the conditions of this probationary period," and stated that if he found "the conditions of this probationary period [to be] unacceptable, [the FHC would] recommend his immediate dismissal."

The president accepted the FHC's recommendation and placed O'Connor on probation. After the College and O'Connor failed to reach an agreement concerning the terms of his probation, the president issued a directive detailing the terms of his probation and stating that failure to comply with those terms could result in the president's recommending to the Board that O'Connor be terminated.

One of the terms of probation outlined in the directive was that O'Connor would "co-direct the Mexico program during the 2005-2006 academic yer." Evidence showed that, when O'Connor received the letter, he changed the term "co-direct" to "direct." He also altered the acknowledgement line to read, "I

acknowledge receipt of this letter, have read it, and understand its content." He signed the directive, as altered, delivered a signed copy to the College, and returned to work, as required by the directive.

O'Connor refused to direct the Mexico program because he disagreed with its being conducted in Oaxaca. Thereafter, the president recommended that O'Connor be terminated for neglect of duty, and the Board of Trustees voted unanimously to terminate his employment.

II. Breach of Tenure Contract

The parties stipulated that O'Connor's tenured employment by the College is governed by the terms of the Handbook. As elements of his breach of contract claim, he argues that (1) because the FHC determined there was not adequate cause for terminating him, the College could not place him on probation and then later terminate; and (2) the Handbook did not authorize the president, by issuing a directive, to revoke rights accorded him in the tenure contract. We conclude O'Connor failed to establish his claim for breach of contract.

While we defer to a trial court's or jury's factual findings, contract interpretation is a question of law that we review de novo. Copper Mountain, Inc. v. Industrial Systems, Inc., 208 P.3d 692, 696 (Colo. 2009). "The primary goal of contract interpretation is to determine and give effect to the intent of the parties. [That intent] is to be determined primarily from the language of the instrument itself." Ad Two, Inc. v. City & County of

Denver ex rel. Manager of Aviation, 9 P.3d 373, 376 (Colo. 2000) (citation omitted).

We reject O'Connor's contention that the FHC lacked authority to recommend that he be put on probation. In accordance with the FHC's recommendation, the president issued a directive placing O'Connor on probation. The directive set out the terms of his probation. Nothing in the Handbook prevented the president from issuing such a directive. On the contrary, section V.E. of the Handbook gives the dean the right to impose discipline other than dismissal, and states, "The President shall make the final decision in all such disciplinary cases." If O'Connor violated a term of probation, and that violation constituted neglect of duty, the Handbook authorized his termination.

Furthermore, nothing in the Handbook prohibited the FHC from recommending probation in the event it did not find sufficient grounds for dismissal. In support of his contention that the FHC lacked such power, O'Connor points to the following language of handbook, section V.B.3.

> The hearing committee will report in writing to the President, indicating its recommendations as to whether adequate cause exists for dismissal . . . . If the hearing committee concludes that adequate cause for dismissal has not been established and the President rejects that recommendation, the President will respond in writing to the hearing committee, the Faculty Executive Committee and the concerned faculty member, stating the President's reasons, and

provide an opportunity for responses before transmitting the case to the Board of Trustees. If the hearing committee concludes that that adequate cause for dismissal has been established but that disciplinary action less than dismissal would be more appropriate, it will so recommend, with supporting reasons.

According to O'Connor, because the Handbook does not say that the FHC can recommend probation if it does *not* find grounds for dismissal precluded it from recommending probation. No such prohibition appears in the handbook, and we will not read one into the contract. *See Yamin v. Levine,* 120 Colo. 35, 37, 206 P.2d 596, 597 (1949). A party cannot be liable for breach of a provision that is *not* part of that party's contract. Thus, it was not a breach of the Handbook for the FHC to recommend probation, or for the president to act on that recommendation.

It was a question for the jury whether O'Connor neglected his duty. Our review of the record shows that evidence supported the conclusions that he violated the terms of probation by failing to direct the Mexico program; that his failure to do so constituted neglect of duty; and that such neglect of duty was cause for termination.

O'Connor contends that it was not proper for the College to terminate him for failing to direct the Mexico program because his refusal to do so was an exercise of academic freedom. It was for the jury to decide whether his refusal was proper under the academic freedom doctrine, and there is record support for its implicit determination that the

doctrine did not excuse his conduct. From the evidence properly admitted at trial, a reasonable jury could have concluded that the requirement that he direct the program was a term of his probation, an the doctrine of academic freedom did not give him the right to violate that term. *Cf. Saxe v. Bd. of Trustees,* 179 P.3d 67, 74, 78 (Colo. App. 2007) (holding that college board did not have statutory or contractual authority to unilaterally modify certain provisions in an employment handbook, and noting that "tenure serves to protect academic freedom by ensuring tenured faculty will not fear reprisals on account of their academic pursuits in the guise of economic layoffs").

Contrary to O'Connor's contention, the College was not bound by the FHC's earlier determination that his refusal to participate in the Oaxaca program was a valid exercise of academic freedom. The FHC was not called on to decide the same question the jury was called on to decide here: namely, whether academic freedom excused his failure to comply with an express term of his probation. Thus the FHC's determination carries no weight on this distinct issue.

Because the record supports the jury's finding that the College did not breach the tenure contract, we will not disturb that finding.

III. Pretrial Issues

A. Inadvertently Disclosed Documents

O'Connor contends the trial court erred in ordering inadvertently disclosed documents, which contained attorney-client privileged communications, to be returned to the College. We disagree.

We review a trial court's discovery rulings for abuse of discretion, which occurs when "the trial court's decision is manifestly arbitrary, unreasonable, or unfair, or when the trial court applies incorrect legal standards." *Medina v. Conseco Annuity Assurance Co.*, 121 P.3d 345, 347 (Colo. App. 2005). This standard of review also applies to a trial court's conclusions regarding the attorney-client privilege. *Black v. Southwestern Water Conservation Dist.*, 74 P.3d 462, 468 (Colo. App. 2003).

1. Whether the Documents Should Have Been Produced

Attorney-client communications are privileged in Colorado. *See* § 13-90-107(1)(b), C.R.S. 2009. This privilege "extends only to matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations." *Gordon v. Boyles*, 9 P.3d 1106, 1123 (Colo. 2000).

To be privileged, statements must be made under the circumstances giving rise to a reasonable expectation that they will be treated as confidential. *Wesp v. Everson*, 33 P.3d 191, 197 (Colo. 2001). Thus, it is not sufficient merely to show that the communication was from client to attorney; instead, the circumstances must indicate the intention of secrecy. *D.A.S. v. People*, 863 P.2d 291, 295 (Colo. 1993).

Once a communication is shown to be privileged, the party seeking to overcome the privilege must establish and express or implied waiver. *Wesp,* 33 P.3d at 198. To establish an implied waiver, there must be evidence showing that the privilege holder, by words or conduct, has impliedly given up any claim of confidentiality with respect to the communication in question. *Id.* A waiver may be established when, among other things, "a witness testifies as to the communication without objection by the privilege-holder," or when a privileged communication is subsequently disclosed to a third party. *Id.*

The trial court did not abuse its discretion in declining to order production of the documents to O'Connor. The court correctly applied the factors set forth in *Floyd v. Coors Brewing Co.*, 952 P.2d 797, 808-09 (Colo. App. 1997*), rev'd on other grounds*, 978 P.2d 663 (Colo. 1999). The record supports the trial court's findings that

> • the documents were attorney-client privileged, had been inadvertently disclosed, and were few in number compared with the large volume of documents produced;
> • adequate safeguards had been put in place to preclude inadvertent disclosure;
> • while former defense counsel could have done more to safeguard the documents, his treatment of them was "neither complacent nor reckless";
> • in light of the number of documents being exchanged, the failure to discover that privileged documents had been copied was

not careless, but rather "inadvertent, and nothing more";

- there was timely discovery of the mistake a nd demand for return of the privileged documents; and
- the College had not waived the attorney-client privilege.

We further reject O'Connor's argument that the trial court should have applied the crime-fraud exception to the facts of this case. A party may establish a waiver of the attorney-client privilege by showing the crime-fraud exception applies. Communications between an attorney and client are not privileged if they are made for the purpose of aiding the commission of a future or present continuing crime or fraud. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982). The proponent of a crime fraud exception must "at least demonstrate probable cause to believe that a crime or fraud has been attempted or committed and that the communication was in furtherance thereof." *People v. Tucker*, ___ P.3d ___, ___ (Colo. App. No. 06CA2580, Oct. 1, 2009). This burden is met only by showing facts "adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the crime or fraud exception to the attorney-client privilege ahs occurred." *Caldwell v. Dist. Court*, 644 P.2d 26, 33 (Colo. 1982).

We agree with the College that O'Connor failed to preserve his argument for application of the crime-fraud exception by not raising it in the trial court. In any event, we have reviewed the documents

in question, and conclude that by no stretch of the imagination do they present evidence of either crime or fraudulent conduct.

O'Connor further argues that it was error for the trial court not to review the inadvertently disclosed documents before making its ruling. We conclude that any such error was harmless. We have reviewed the documents de novo, and conclude there is no basis to overturn the trial court's determination that the privileged documents were not properly subject to discovery. To the extent that some of the documents were discoverable, the record indicates they were otherwise produced to O'Connor. *See* C.A.R. 35(e) ("appellate court shall disregard any error or defect not affecting the substantial rights of the parties").

2. Whether the Privilege Was Waived

O'Connor argues that the attorney-client privilege as to these documents was waived through the testimony of defendants' counsel Loretta Martinez at the spoliation hearing. We conclude O'Connor waived the argument.

At the spoliation hearing, defendants' counsel emphasized that they did not intend any general waiver of the attorney-client privilege by having Martinez testify on the spoliation issue. O'Connor's counsel stated that they had no intention of later claiming defendants had waived their attorney-client privilege by allowing Martinez to testify. O'Connor is bound by his counsel's representation. Although O'Connor's brief makes a vague reference to "other

occasions" on which defendants waived the privilege, he has not specified what those are, and has provided no record citations or argument to support this assertion. Thus, we will not consider it. *See Mauldin v. Lowery*, 127 Colo. 234, 236, 255 P.2d 976, 977 (1953).

B. Student Contact Information

O'Connor asserts it was error for the trial court to deny the motion to reconsider his motion to compel the production of names and contact information for College students. We note that this motion was a belated attempt to recast his previous, grossly overbroad discovery request. *See Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1188 (Colo. 2002) (scope of discovery, while broad, is not limitless). We conclude that the trial court did not abuse its discretion to deny what was really a new discovery request made after the expiration of the discovery deadline. In any event, we conclude any error in denial of this request was harmless, as O'Connor submitted copious evidence of his teaching skills, including his honor as Teacher of the Year, his original grant of tenure, written student comments and course evaluations that showed he performed well, and the testimony of students that weighed in his favor at trial. O'Connor does not explain what testimony the additional students could have offered that would not have been cumulative evidence.

IV. Evidentiary Issues

O'Connor contends that the trial court abused its discretion by excluding evidence of (1) the

department chair's suicide attempt, (2) another professor's tenure denial, and (3) a scientific report discussing asbestos on campus. He also argues the court erred in admitting hearsay testimony and the testimony of an expert witness. We disagree with these contentions.

We review a trial court's evidentiary rulings for abuse of discretion, which occurs when a trial court's decision is manifestly arbitrary, unreasonable, or unfair. *Bonser v. Shainholtz*, 3 P.3d 422, 424 (Colo. 2000).

A. Evidence of Suicide

O'Connor contends that evidence of the former department chair's suicide attempt was improperly excluded. We agree with the trial court's conclusion that the unfair prejudicial effect of this evidence substantially outweighed its probative value, which we deem to be minimal. Moreover, this evidence would have had an undue tendency to confuse the jury. Thus, its admission was properly precluded under C.R.E. 403.

B. Tenure Denial

O'Connor argues it was error to exclude a report of the College Appeal Board that found another professor had been denied a fair review and improperly denied tenure. We agree with the trial court's determination that the evidence represented as being contained in the report (which does not appear in the record) was irrelevant. Therefore, the

court did not abuse its discretion in excluding the report from evidence.

C. Asbestos Report

O'Connor contends that a 1984 CSU report regarding the presence and levels of asbestos on the College campus should have been admitted to show there was a scientific basis for his whistleblowing activities. We conclude any error in the exclusion of this evidence was harmless, as it was cumulative to other ample evidence concerning the presence of asbestos on campus and O'Connor's whistleblowing. Moreover, the College did not dispute there had been asbestos on campus, or that it was potentially harmful, and thus there is no reasonable possibility the exclusion of this evidence could have affected the outcome of the trial. *See* C.A.R. 35(e).

D. Hearsay

O'Connor maintains that the trial court erred in admitting testimony from the president concerning statements made by a person who was unavailable for trial. Because O'Connor failed to preserve the issue for appeal, we do not consider his contention.

In order to preserve an objection for appellate review, the party raising the issue must have made a contemporaneous objection at trial to the alleged error. *See In re Haines,* 177 P.3d 1239, 1251 (Colo. 2008). Here, no timely objection was made t the admission of the president's testimony concerning the unavailable person's statements. On the

contrary, O'Connor's counsel stipulated to the admissibility of those statements.

E. Expert Witness

According to O'Connor, the trial court erred in (1) qualifying Steven Olswang as an expert in the customs and usage of academic freedom and tenure contracts, (2) allowing him to testify to opinions that were based on facts contrary to the evidence admitted at trial, and (3) allowing him to testify to legal conclusions. We are not persuaded.

A trial court may admit expert testimony if it will assist the trier of fact to understand the evidence or to determine a fact in issue. C.R.E. 702; *People v. Lesslie*, 939 P.2d 443, 450 (Colo. App. 1996). In exercising its discretion to admit expert testimony under C.R.E. 702, the trial court should consider numerous factors, including the nature and extent of the evidence in the case, the expertise of the proposed witness, the sufficiency and extent of the fundamental evidence upon which the expert witness's ultimate opinion is to be based, and the scope and content of the opinion itself. *Lesslie*, 939 P.2d at 450.

However, expert testimony, although helpful to the trier of fact, may still be excluded where it would invade the province of the court. Id. Although opinion testimony is not objectionable because it embraces an ultimate issue of fact, an expert may not usurp function of the court by expressing an opinion of the applicable law or legal standards. Quintana v. City of Westminster, 8 P.3d 527 (Colo.

App. 2000). Nor may an expert simply tell the jury what result to reach. *Lesslie*, 939 P.2d at 450.

Trial courts are vested with broad discretion to determine the admissibility of expert testimony. Masters v. People, 58 P.3d 979, 988 (Colo. 2002). We will uphold a trial court's decision to admit expert testimony so long as it is not manifestly erroneous or an abuse of discretion. City of Aurora ex rel. Utility Enter. v. Colorado State Engineer, 105 P.3d 595, 612 (Colo. 2005).

We conclude the trial court did not abuse its discretion in qualifying Olswang as an expert in the customs and usages of academic freedom and tenure under E.R.E. 702. His testimony embraced specialized knowledge outside the ken of the average juror, and he established his expertise and credentials sufficiently to allow him to present expert testimony s to such customs and usages. *See Saxe,* 179 P.3d at 76 (finding expert testimony admissible to explain customs and usages surrounding tenure contract).

O'Connor did not object at trial to Olswang's testimony about O'Connor's "probationary agreement," and thus his current argument that use of that term was improper is not preserved for our review. And though O'Connor now asserts it was improper for Olswang to testify that the former had been given "probation in lieu of termination," he did not object to that testimony at trial, and thus this issue was also not preserved. In any event, Olswang did not testify that O'Connor was given probation in lieu of termination, but rather that the *custom* was

to give such to a faculty member in the circumstance described. O'Connor provides no citation to the record to support his assertion that Olswang testified that "O'Connor's refusal to participate in the Oaxaca program would disrupt the function of college programs," and no legal argument as to why such testimony would have been improper and thus we will not review it. *See Mauldin,* 127 Colo. at 236, 255 P.2d at 977.

To the extent O'Connor argues it was error to admit Olswang's testimony regarding whether O'Connor was entitled to a second hearing, we conclude any error was harmless. The Handbook established that the College's duty to provide a hearing was triggered by a written request from the faculty member. It is undisputed that O'Connor did not make any such written request after he was placed on probation, and thus he did not prove he was contractually entitled to a second hearing. Therefore, there is no reasonable possibility that Olswang's opinion on this issue could have affected the outcome of the case.

O'Connor has not cited to any other instances in which Olswang's testimony arguably strayed into interpretation of the Handbook's provisions. Thus, we reject his blanket contention that Olswang's testimony went beyond customs and usages to "the specific interpretation of [his] tenure contract."

V. Jury Instructions

O'Connor argues that the trial court erred by not giving an adverse inference jury instruction as a

sanction for the alleged destruction of, or failure to preserve, the former department chair's suicide note. We disagree.

As a preliminary matter, we conclude O'Connor preserved this issue for appellate review by (1) filing a motion for sanctions based on defendants' alleged destruction of or a failure to preserve evidence and attaching an exhibit to the motion that referenced the note and that fact that the College no longer possessed it, and (2) requesting an adverse inference instruction based on the College's alleged failure to preserve evidence.

Because trial courts enjoy broad discretion to impose sanctions for spoliation of evidence, we will not overturn a court's determination regarding sanctions absent an abuse of discretion. *Castillo v. Chief Alternative, LLC*, 140 P.3d 234, 236 (Colo. App. 2006). To constitute an abuse of discretion, the trial court's determination must have been manifestly arbitrary, unreasonable, or unfair. *Aloi v. Union Pacific R.R. Corp.*, 129 P. 3d 999, 1002 (Colo. 2006).

We have already decided that evidence of the suicide was properly excluded. Because any such evidence would not have been admissible, we conclude the trial court did not abuse its discretion in declining to give an adverse inference instruction based on defendants' alleged failure to preserve the note. For the same reasons the note was properly excluded under C.R.E. 403, the instruction would have been unfairly prejudicial to defendants and

would have injected a collateral and unduly confusing issue into jury deliberations.

VI. Juror Misconduct

O'Connor argues that the jury verdict was improperly influenced by the misconduct of the jury foreman and, as a result, he is entitled to a new trial. Because we conclude this issue is not properly before us, we do not consider it.

Generally, an issue need not be asserted in the notice of appeal to be preserved. *Giampapa v. American Family Mut. Ins. Co,*. 919 P.2d 838, 840 (Colo. App. 1995); *see* C.A.R. 3(d)(3) (providing that the notice of appeal must contain an advisory listing of issues to be appealed). However, where an issue (1) was not properly preserved in the trial court, *and* (2) does not appear in the notice of appeal, that issue is not preserved for appellate review. *See Vikman v. Int'l Bhd. of Elec. Workers, Local Union No, 1269,* 889 P.2d 646, 658-59 (Colo. 1995).

Here, O'Connor failed to preserve the juror misconduct issue for appellate review, because he failed to move for a new trial under C.R.C.P. 59 within the fifteen-day period allowed for such a motion and did not list this in his notice of appeal. His motion for a new trial, based in part on the alleged juror misconduct, was filed several months after the deadline for such a motion had passed. Therefore, we decline to consider the issue.

The judgment is affirmed.

JUDGE RUSSEL and JUDGE NEY concur.

DISTRICT COURT, EL PASO COUNTY, COLORADO
Court Address:
20 E. Vermijo Avenue
Colorado Springs, CO 80903

Plaintiff:
KEVIN J. O'CONNOR, an individual,

Defendants:
COLORADO COLLEGE, a Colorado nonprofit corporation; RICHARD F. (DICK) CELESTE, President of Colorado College, individually; RICHARD STOREY, former Dean of the Faculty and Dean of Colorado College, individually; CLARA LOMAS, Chair of Colorado College Romance Languages Department, individually; SALVINO (SALVATORE) BIZZARRO, a Colorado College Professor, individually; and MARIE DANIELS, a Colorado College Professor, individually

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Case Number: 2006-CV-733
Div.: Ctrm.:

JUDGMENT

A jury trial in this case was conducted in El Paso County District Court, Division 5, from

August 7, 2007 to August 27, 2007. After deliberation, the empaneled jury returned a verdict in favor of Defendants, Colorado College, Richard F. (Dick) Celeste, Richard Storey, Clara Lomas, Salvino (Salvatore) Bizzarro, and Marie Daniels (collectively, "Defendants"), and against Plaintiff, Kevin J. O'Connor on all of Plaintiff's claims.

ACCORDINGLY, pursuant to C.R.C.P. 58(a), final judgment is hereby entered in favor of Defendants and against Plaintiff in accordance with the verdict reached by the jury on August 27, 2007. This action, and the claims brought in this action, are dismissed with prejudice, except that the Court retains jurisdiction over, and reserves determination of, the taxing of costs pursuant to C.R.C.P. 54(d).

IT IS SO ORDERED this ____ day of November 2007.

_____

Judge Larry E. Schwartz,
El Paso County District Court Judge

Colorado Court of Appeals
2 East 14th Ave.
Third Floor
Denver, CO 80203

El Paso County
2006CV733

Plaintiff-Appellant:

Kevin J. O'Connor,

v.

Court of Appeals Case Number:
2007CA2571

Defendants-Appellees:

Colorado College, a Colorado nonprofit corporation; Richard F. Celeste, President of Colorado College, individually; Richard Storey, former Dean of the Faculty and Dean of Colorado College, individually; Clara Lomas, Chair of the Colorado College Department of Romance Languages, individually; Salvino (Salvatore) Bizzarro, a Colorado College Professor, individually; and Marie Daniels, a Colorado College Professor, individually.

ORDER DENYING PETITION FOR REHEARING

APPENDIX C

The **PETITION FOR REHEARING and MOTION FOR PUBLICATION** filed in this appeal by:

Kevin J. O'Connor, Plaintiff-Appellant

is **DENIED**.

Issuance of the Mandate is stayed until April 5, 2010.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: MARCH 4, 2010

BY THE COURT:

Judge Terry
Judge Russel
Judge Ney

Colorado Supreme Court
101 West Colfax Avenue, Suite 800
Denver, CO 80202

Certiorari to the Court of Appeals, 2007CA2571
District Court, El Paso County, 2006CV733

Petitioner:

Kevin J. O'Connor,

v.

Supreme Court Case No:
2010SC198

Respondents:

Colorado College, a Colorado nonprofit corporation; Richard F. Celeste, President of Colorado College; Richard Storey, former Dean of Colorado College; Clara Lomas, Chair of the Colorado College Department of Romance Languages; Salvino Bizzarro,Colorado College Professor; and Marie Daniels, Colorado College Professor.

ORDER OF COURT

APPENDIX D

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 16, 2010.

(SEAL)
SUPREME COURT
STATE OF COLORADO